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Delimiting Liability for South Carolina Limited Liability Corporations: When Can an LLC Manager be Personally Liable for Tortious Interference?

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**DELIMITING LIABILITY FOR SOUTH CAROLINA
LIMITED LIABILITY CORPORATIONS:
WHEN CAN AN LLC MANAGER BE PERSONALLY LIABLE FOR
TORTIOUS INTERFERENCE?**

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I. INTRODUCTION

South Carolina courts have recently begun to shift away from some corporate protections from personal liability that Limited Liability Corporations (LLCs) provide, leaving members of South Carolina LLCs facing a great deal of uncertainty.¹ The South Carolina Supreme Court’s decision in *16 Jade Street, LLC v. R. Design Construction Co.*² signaled this shift by denying LLC members a “sweeping liability shield” that would protect tortfeasors from personal liability.³ Deciding an issue of first impression in South Carolina, the court held that a member of an LLC can be held personally liable for torts the member

1. See Andrew Cole, *The New Amalgamation in South Carolina—A Shortcut to Corporate Liability?*, DEF. LINE, Summer 2012, at 33, 36.

2. 398 S.C. 338, 728 S.E.2d 448 (2012), *reh’g granted* (May 7, 2012).

3. Andrew M. Connor, *Personal Liability for LLC Members: Defining the Limits of Limited Liability*, DEF. LINE, Summer 2012, at 29, 29 (citing *Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454).

commits, even while acting in furtherance of the company's business.⁴ Following this decision, the South Carolina Supreme Court decided a similar case in which the plaintiff alleged that an LLC manager could be held personally liable for tortious interference with contracts between his LLC and a real estate developer.⁵ In *Dutch Fork Development Group II, LLC v. SEL Properties, LLC*,⁶ the court held that an LLC manager may be held liable for tortious interference with a contract of the LLC,⁷ but found the facts of this particular case insufficient to find the manager personally liable.⁸ This decision is a significant expansion of a relatively undefined LLC jurisprudence in South Carolina. The opinion affirms the supreme court's recent pronouncement in *16 Jade Street* of personal liability for an LLC member and applies it to an LLC manager's tortious interference with a contract of the LLC.⁹ The court's legal analysis here skips both some analytical and explanatory steps in ultimately concluding that there was not sufficient evidence to find the LLC manager liable for tortious interference with the LLC's contract.¹⁰ The result is a somewhat confusing recitation of the law that applies to tortious interference cases involving members or managers of an LLC. Additionally, a thorough analysis of the tortious interference principles applied in *Dutch Fork Development* reveals that the South Carolina Supreme Court both failed to give adequate consideration to a manager's possible personal interest in interfering with the LLC's contract and failed to provide a sufficient framework for determining what actions may leave an LLC manager exposed to liability for tortious interference.¹¹

This Note seeks to resolve the potential confusion resulting from *Dutch Fork Development* by providing a more clear and comprehensive picture of the legal framework that courts should apply in determining whether an LLC member or manager is personally liable for tortious interference with an LLC's contract in South Carolina. It will provide additional explanation of the legal concepts at issue, examples of further case law, and a more coherent step-by-step analysis of LLC member and manager liability for tortious interference with an LLC's contract.

4. *Jade St.*, 398 S.C. at 344, 349, 728 S.E.2d at 451, 454 (citing S.C. CODE ANN. § 33-44-303(a) (2006)).

5. *See Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, No. 27139, 2012 WL 3667374, at *1 (S.C. Aug. 22, 2012).

6. 2012 WL 3667374.

7. *Id.* at *5.

8. *See id.* at *6.

9. *See id.* at *4 (citing *Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454).

10. *See id.* at *4–6 (citations omitted).

11. *See id.* at *5–6.

II. BACKGROUND

A. *South Carolina LLC Statutes—Defining an LLC*

The formation and regulation of LLCs are governed by the South Carolina Uniform Limited Liability Company Act of 1996 (the Act).¹² An LLC is a “legal entity separate and distinct from its owners that is formed by filing Articles of Organization with the Secretary of State and paying a . . . filing fee.”¹³ An LLC operates as “an unincorporated business association that provides its owners (members) [with] limited liability [as well as] flexible management and financial alternatives.”¹⁴ To illustrate, an LLC resembles a general partnership whose partners do not “have personal liability for the obligations of the partnership.”¹⁵ An LLC may also be said to resemble a corporation that is taxed as a partnership.¹⁶ Thus, the two primary advantages to the members of an LLC are (1) limited liability and (2) partnership taxation.¹⁷ These advantages have made LLCs a popular choice of business entity for South Carolina business owners.¹⁸

The management function of an LLC depends on whether the members elect, in the LLC’s articles of organization, for the LLC to be manager-managed.¹⁹ An LLC will remain member-managed unless it is designated as manager-managed.²⁰ This choice of management type is critical because it ultimately defines who is responsible for the management and conduct of the LLC’s business and determines “who are agents and have the apparent authority to bind the [LLC].”²¹ In a member-managed LLC, each member has “equal rights in the management and conduct of the . . . business,” and a majority of the members may decide almost any matter relating to the business of the LLC.²² Furthermore, with limited exceptions, in a member-managed LLC, “[e]ach member is an agent of the [LLC] for the purpose of its business, and an act of a

12. S.C. CODE ANN. §§ 33-44-101 to -1208 (2006).

13. Thomas A. Brumgardt, *The ABCs of Entity Choice*, S.C. LAW., Mar. 2006, at 14, 19; see also S.C. CODE ANN. §§ 33-44-201 to -202 (2006) (outlining the entity characteristics and organization of LLCs).

14. Burnet R. Maybank III & Rick Handel, *New Limited Liability Company Act*, S.C. LAW., July/Aug. 1996, at 60, 60.

15. Scott Y. Barnes et al., *1996 Limited Liability Company Act*, S.C. LAW., Nov./Dec. 1996, at 33, 33.

16. *Id.*

17. *Id.*

18. Brumgardt, *supra* note 13, at 19.

19. See S.C. CODE ANN. § 33-44-203(a)(6) (2006); see also Brumgardt, *supra* note 13, at 19–21 (citing S.C. CODE ANN. § 33-44-301(a)(1), (b) (Supp. 2004); *id.* § 33-44-404; *id.* § 33-44-405(a)) (describing the management types).

20. § 33-44-203(a)(6) cmt.

21. *Id.*

22. § 33-44-404(a); see also *id.* § 33-44-404(c) (enumerating matters requiring the consent of all members, rather than a majority).

member . . . for apparently carrying on in the ordinary course the company's business . . . binds the company."²³ Conversely, in a manager-managed LLC, "member[s are] not agent[s] of the company for the purpose of its business solely by reason of being a member."²⁴

If the LLC elects to be manager-managed, managers must be "designated, appointed, elected, removed, or replaced by a vote, or consent of a majority of the members."²⁵ Once elected, each manager has "equal rights in the management and conduct of the company's business."²⁶ Thus, any matter relating to the business of the company, except for a few enumerated actions requiring the consent of all members,²⁷ "may be exclusively decided by the manager or . . . by a majority of the managers" if there are more than one.²⁸ In accordance with a manager's role as business manager, he is an agent of the company for the purpose of carrying out its business with limited exceptions.²⁹ Consequently, an act of a manager for apparently carrying on in the ordinary course the company's business binds the company.³⁰ Furthermore, in a manager-managed company only the managers generally have the agency authority to bind the company³¹ and "the acts of [a] member are not imputed to the company unless the member is acting under actual or apparent authority created by circumstances other than membership status."³² However, "the agency designation relates only to agency and does not preclude members of a manager-managed [LLC] from participating in the actual management of company business."³³

23. § 33-44-301(a)(1). However, this section provides an exception to the member's binding agency authority when "the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority." *Id.* It also provides that "[a]n act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members." § 33-44-301(a)(2).

24. § 33-44-301(b)(1).

25. § 33-44-404(b)(3)(i).

26. § 33-44-404(b)(1).

27. *See* § 33-44-404(c) (enumerating matters requiring the consent of all members).

28. § 33-44-404(b)(2).

29. § 33-44-301(b)(1). Similar to the provision for member-managers, this section provides an exception to a manager's binding agency authority when "the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority." *Id.* The statute further provides that "[a]n act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized [by the required consent of other members or managers.]" § 33-44-301(b)(2).

30. § 33-44-301(b)(1).

31. *Id.* § 33-44-203 cmt.

32. *Id.* § 33-44-302 cmt.

33. § 33-44-203 cmt.

B. Personal Liability of LLC Members

The Act provides that “the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company.”³⁴ It further provides that “[a] member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.”³⁵ Additionally, the LLC’s failure to observe the usual company formalities or requirements “is not a ground for imposing personal liability on the members or managers.”³⁶ However, the statutory liability protection for managers and members may be waived, thus making them liable in their capacity as members for either all or specified debts, obligations, or liabilities of the company.³⁷ To create such a waiver of the personal liability shield, the articles of organization must contain a provision to that effect and the member to be held liable must have consented in writing to be bound by the provision.³⁸

Until very recently, the South Carolina Supreme Court had never directly addressed the issue of personal liability for an LLC member’s own action and how section 33-44-303(a) applies to allow or prohibit such liability.³⁹ However, in April 2012, the court decided *16 Jade Street, LLC v. R. Design Construction Co.* and held that a member of an LLC can be personally liable for torts committed while acting in furtherance of the company’s business.⁴⁰ While the court acknowledged that the language of section 33-44-303 appears to insulate an LLC member from personal liability, it concluded that “such a sweeping liability shield was not intended by the General Assembly.”⁴¹ Accordingly, the court held that “section 33-44-303(a) only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions.”⁴² Furthermore, the court’s holding imposes personal liability on individual LLC members or managers even for torts committed in furtherance of the company’s business.⁴³ Accordingly, the *Jade Street* court held a member of an LLC construction company personally liable for negligence that resulted in numerous construction defects even though his actions were taken in furtherance of the LLC’s business.⁴⁴ In so holding, the court noted that a

34. *Id.* § 33-44-303(a).

35. *Id.*

36. § 33-44-303(b).

37. *See* § 33-44-303(c).

38. *Id.*

39. Connor, *supra* note 3, at 29 (citing *16 Jade St., LLC v. R. Design Const. Co.*, 398 S.C. 338, 349, 728 S.E.2d 448, 454 (2012), *reh’g granted* (May 7, 2012)).

40. *See Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454.

41. *Id.* at 343, 728 S.E.2d at 450.

42. *Id.* at 349, 728 S.E.2d at 454.

43. *See id.* (holding tortfeasor personally liable for a tort committed in furtherance of the company’s business).

44. *See id.* at 349–50, 728 S.E.2d at 454.

majority of states' courts that have examined similar statutory language have likewise concluded that a member is always liable for his own torts and cannot rely on his status as a member of an LLC as a shield.⁴⁵ Thus, it appears that the *Jade Street* decision brings South Carolina "in line with the majority view" on LLC members' liability for their own actions.⁴⁶

Even though the *Jade Street* declaration of personal liability for LLC members and managers for their own actions is clear,⁴⁷ uncertainty still exists surrounding the decision and the legal positions the decision espouses.⁴⁸ This uncertainty arises from the South Carolina Supreme Court's rehearing of *Jade Street* on October 17, 2012,⁴⁹ and the fact that the court has yet to issue a new opinion. Moreover, following the initial supreme court decision, a joint resolution was introduced in the South Carolina General Assembly to amend the Act to expressly state that it is the "clear and unambiguous intent of the General Assembly . . . to shield a member of an LLC from personal liability for actions taken [on behalf of the LLC]."⁵⁰ However, the joint resolution did not receive three readings in both chambers before the legislative session adjourned.⁵¹ Whether a similar joint resolution is introduced in the next session will presumably depend on the outcome of the *Jade Street* rehearing.⁵²

Though this development is interesting, and the court may indeed revise its opinion, the court will not necessarily reverse itself in a rehearing.⁵³ Instead, the court could choose to "clarify its opinion."⁵⁴ Until then, "*Jade LLC* remains the law in South Carolina unless and until the Supreme Court reverses or modifies its opinion or the legislature amends the LLC Act."⁵⁵ While steps have been taken to change the law through both of these processes, the rehearing and

45. See *id.* at 347, 728 S.E.2d at 453.

46. Connor, *supra* note 3, at 30.

47. See *Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454.

48. See Cole, *supra* note 1, at 36.

49. See *Supreme Court-Roster of Cases for Hearing*, S.C. JUD. DEP'T, <http://www.judicial.state.sc.us/supremeRosters/dspSupRosterChoice.cfm> (select "October 2012") (last visited Apr. 6, 2013).

50. S.J. Res 1416, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/1416.htm (introduced in the Senate on April 10, 2012, and referred to the Senate Judiciary Committee on April 11, 2012); H.R.J. Res. 5150, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/5150.htm (introduced in the House on April 19, 2012, where it received three readings before being sent to the Senate on April 27, 2012, where it received only two readings); see also Cole, *supra* note 1, at 36 (quoting S.J. Res. 1416) (describing the joint resolution as a reason for uncertainty); *Annual Meeting and CLE Seminar*, ASS'N CORP. COUNS., <http://www.acc.com/chapters/sc/index.cfm?eventID=12540> (last visited Apr. 6, 2013) (describing the joint resolution's origination).

51. *Annual Meeting and CLE Seminar*, *supra* note 50.

52. *Id.*

53. *Business & Commercial Newsletter*, GALLIVAN, WHITE & BOYD, P.A. (May 2012), <http://www.gwblawfirm.com/enewsletter-bc-may-2012.php>.

54. *Id.*

55. *Id.*

proposed joint resolution are not guarantees that any significant change will actually occur.⁵⁶ Even though there may be some concern from the defense bar and LLC owners over the personal liability implications of the court's decision for those operating LLCs in South Carolina,⁵⁷ the court's decision is in accordance with the majority of courts that have dealt with the issue in states with similar statutes.⁵⁸ Furthermore, the South Carolina Supreme Court promptly relied on *Jade Street's* pronouncement of personal liability for LLC members acting in furtherance of the LLC's business in *Dutch Fork Development*, affirming the court's willingness to apply the decision's holding while establishing that an LLC manager could be held personally liable for tortious interference with a contract.⁵⁹

C. Tortious Interference with a Contract

The South Carolina Supreme Court has expressly stated that “[t]he elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.”⁶⁰ An action for tortious interference protects “the parties to a contract against unlawful interference by third parties” but provides no protection from the wrongful actions of the parties to the contract.⁶¹

The fourth element, absence of justification, warrants further discussion because it represents the convergence of tortious interference's third-party

56. *See id.*

57. *See generally id.* (defense firm expresses concern over the implications and warns LLC members to take precautions to protect themselves).

58. *See* 16 *Jade St., LLC v. R. Design Constr. Co.*, 398 S.C. 338, 344, 728 S.E.2d 448, 451 (2012), *reh'g granted* (May 7, 2012); *see, e.g.,* *Hoang v. Arbess*, 80 P.3d 863, 867 (Colo. App. 2003) (citing *Snowden v. Taggart*, 17 P.2d 305, 307 (Colo. 1932)) (finding that “an officer may be held personally liable for his or her individual acts of negligence even though committed on behalf of the corporation”); *Ventres v. Goodspeed Airport, LLC*, 881 A.2d 937, 963 (Conn. 2005) (finding that a corporate officer could be held personally liable for tortious conduct); *Milk v. Total Pay & HR Solutions, Inc.*, 634 S.E.2d 208, 213 (Ga. Ct. App. 2006) (holding that an “LLC member may be held individually liable if he or she personally participates or cooperates in a tort committed by the LLC or directs it to be done”); *Allen v. Dackman*, 991 A.2d 1216, 1228–29 (Md. 2010) (finding personal tort liability for members committing acts in the name of an LLC); *Rothstein v. Equity Ventures, LLC*, 750 N.Y.S.2d 625, 627 (App. Div. 2002) (agreeing that members of LLCs “may be held personally liable if they participate in the commission of a tort in furtherance of company business”); *D’Elia v. Rice Dev., Inc.*, 147 P.3d 515, 525 (Utah Ct. App. 2006) (applying personal liability to members and managers of an LLC for tortious acts committed on behalf of the LLC).

59. *See Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, No. 27139, 2012 WL 3667374, at *4, *5 (S.C. Aug. 22, 2012) (citing *Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454).

60. *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993) (citing *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 192–93, 336 S.E.2d 472, 473 (1985); *DeBerry v. McCain*, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981)).

61. *Dutch Fork*, 2012 WL 3667374, at *4 (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)) (internal quotation marks omitted).

requirement and agency theory.⁶² In the absence of sufficient South Carolina authority, the South Carolina Supreme Court has relied on the United States Court of Appeals for the Third Circuit to further explain this element.⁶³ The Third Circuit expounded on this element, stating, “in order to make out a claim of tortious interference with contractual relations, a plaintiff must show ‘the absence of privilege or justification on the part of the defendant.’”⁶⁴ Critically, a “principal’s agent [is] afforded a qualified privilege from liability for tortious interference with the principal’s contract.”⁶⁵ “The agent’s privilege is qualified . . . because it applies only when the agent is acting within the scope of [his] authority.”⁶⁶ Accordingly, “if the allegedly interfering acts were conducted outside the scope of the agent’s authority,” then the “agent may be liable for tortious interference, just as if the agent were an outside third party.”⁶⁷ The Third Circuit’s justification for this privilege illustrates the convergence of the third party requirement and agency theory: “The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract.”⁶⁸ The Third Circuit’s approach to privilege for tortious interference with a contract is relevant here because it is the approach that the South Carolina Supreme Court ultimately adopted in *Dutch Fork Development*.⁶⁹

D. Dutch Fork Development Group II, LLC v. SEL Properties, LLC

In *Dutch Fork Development*, the court established that a manager of an LLC can be held personally liable for tortious interference with a contract as a result of his acts.⁷⁰ However, upon the facts presented, the court held that this particular manager was not liable because the plaintiffs failed to identify how he exceeded his authority as the managing agent of the LLC.⁷¹ The court further

62. See, e.g., *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 385 (3d Cir. 2004) (“The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract.”).

63. See *Dutch Fork*, 2012 WL 3667374, at *5 (quoting *CGB Occupational Therapy, Inc.*, 357 F.3d at 385 (“The actions of a principal’s agent are afforded a qualified privilege from liability for tortious interference with the principal’s contract.”)).

64. *CGB Occupational Therapy*, 357 F.3d at 385 (quoting *Crivelli v. Gen. Motors Corp.*, 215 F.3d 386, 394 (3d Cir. 2000)).

65. *Id.*

66. *Id.* (citing *Labalokie v. Capital Area Intermediate Unit*, 926 F. Supp. 503, 509 (M.D. Pa. 1996); *Maier v. Maretti*, 671 A.2d 701, 707 (Pa. Super. Ct. 1995); *Daniel Adams Assocs. v. Rimbach Publ’g, Inc.*, 519 A.2d 997, 1000 (Pa. Super. Ct. 1987)).

67. *Id.* (citing *Labalokie*, 926 F. Supp. at 509).

68. *Id.*

69. See *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, No. 27139, 2012 WL 3667374, at *5 (S.C. Aug. 22, 2012) (quoting *CGB Occupational Therapy*, 357 F.3d at 385).

70. See *id.*

71. See *id.* at *6.

found that there was insufficient evidence to establish a separate claim that the manager was personally liable for tortious interference with a contract.⁷²

In *Dutch Fork Development*, the appellant Stephen Lipscomb was the manager of SEL Properties, LLC (SEL) when SEL negotiated with Dutch Fork Development Group, II, LLC (DFDG) and Dutch Fork Realty, LLC (DFR) (collectively Dutch Fork) to purchase a 122.28 acre piece of property known as Rolling Creek Estates.⁷³ SEL ultimately purchased the property from Dutch Fork for \$800,000 on August 8, 2000.⁷⁴ The parties subsequently entered into two contracts for the development of residential subdivisions on the property.⁷⁵ The first contract, entered into on November 14, 2000, involved a three-phase development of the Courtyards at Rolling Creek (Courtyards).⁷⁶ The second contract, entered into on October 17, 2002, involved the development of a smaller parcel known as Rolling Creek Phase 4 (Rolling Creek).⁷⁷

1. *Terms of the Breached Development Contract*

In the first contract, which gave rise to the dispute, the parties agreed to develop the Courtyards over the five-year term of the contract.⁷⁸ SEL's obligations under that contract were to secure financing for the purchase of the property; to secure engineering studies, surveying, and landscaping; and to incur the costs related to the infrastructure.⁷⁹ Additionally, SEL had "final approval of all costs pertaining to the development of the property."⁸⁰ DFDG was responsible for the development of the property and was to receive a two-part compensation from SEL in return for adequate performance of those development duties.⁸¹ The first component of DFDG's compensation was "a development fee of \$54,000 for each phase of the development, which was contingent upon the sale of 60% of the lots developed in that phase and the 'letting' of the contract for the next phase."⁸² The second component of DFDG's compensation was "25% of the net profits received from the sale of the lots sold in each of the three phases."⁸³

DFR received the exclusive right to sell the lots in the development for a five-year period provided that it sold and closed at least 20% of the lots available

72. *Id.*

73. *Id.* at *1.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*

80. *Id.* (internal quotation marks omitted).

81. *See id.* at *2.

82. *Id.*

83. *Id.*

per year in each of the three phases.⁸⁴ The contract also gave DFR the exclusive right to sell all new homes constructed in the Courtyards for a period of twelve months after construction began on the home.⁸⁵ Additionally, DFR was entitled to the following commissions: a sales commission not to exceed 7% for new construction homes sold under the exclusivity agreement; a real estate commission of 10% upon the sale and closing of developed lots to non-builders; and no commission for any lots sold to builders.⁸⁶

2. *Termination of the Contract*

According to Dutch Fork, SEL significantly delayed the sale of lots in the development by SEL's failure to obtain a bonded plat, failure to promptly fund necessary infrastructural repairs, and failure to promptly pay the project engineer in order to obtain final approval of the redesigned development plans.⁸⁷ SEL's subsequent financial problems and additional work delays resulting from failure to pay the engineering firm and contractors further delayed the sale of lots in the development.⁸⁸ Furthermore, Dutch Fork discovered that lots in the development were being sold below fair market value to a home construction company that Lipscomb himself helped manage, K&L Contracting, LLC (K&L).⁸⁹ Accordingly, DFR (a Dutch Fork entity) contended that such "sales from SEL to K&L circumvented its 'exclusive right to sell' and prevented them from receiving commissions on homes that were sold by K&L."⁹⁰

Lipscomb, on behalf of SEL, then sent a letter, dated May 28, 2004, terminating the development contract, citing as the primary reason, "[t]he failure of DFDG and DFR to sell at least twenty percent (20%) of the available lots in any one year period."⁹¹ Dutch Fork asserted that the requisite number of lots had been sold and filed an action against SEL and Lipscomb as a result of the termination.⁹² After terminating the contract with Dutch Fork, SEL continued to sell lots and eventually entered into a \$7,633,000 contract with Essex Homes, SE, Inc. for the development of two of the initial three phases in the Courtyards.⁹³

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.*

90. *Id.*

91. *Id.* at *3 (alteration in original) (internal quotation marks omitted).

92. *See id.*

93. *Id.*

3. *Procedural Posture*

Dutch Fork alleged against SEL causes of action for breach of contract and breach of contract accompanied by a fraudulent act.⁹⁴ Dutch Fork alleged against Lipscomb, in his individual capacity, causes of action for conversion and tortious interference with a contract.⁹⁵ With regard to the breach of contract claim against SEL, Lipscomb conceded at trial that SEL owed Dutch Fork money as a result of SEL's breach of the two contracts and claimed he sent the termination letter because he mistakenly believed that Dutch Fork was required to sell two lots per month.⁹⁶ However, he disagreed with the assertion that Dutch Fork was entitled to \$3,030,667 in damages for the unpaid profit split, development fees, and real estate commissions.⁹⁷ As for the claims against him, Lipscomb maintained that his decisions and actions regarding the project were made not for his personal benefit, but rather, on behalf of SEL, and thus he was protected from personal liability under both the Act and the third party requirement of a tortious interference with a contract claim.⁹⁸

The trial judge directed verdicts in favor of Lipscomb for the conversion claim and in favor of Dutch Fork for the breach of contract claim for the Phase I development fees of \$54,000.⁹⁹ The jury then returned a verdict against SEL for the breach of contract claim and the breach of contract accompanied by a fraudulent act claim in the amounts of \$299,144 in actual damages and \$1 million in punitive damages, respectively.¹⁰⁰ The jury also returned a verdict against Lipscomb in his individual capacity for the tortious interference claim in the amount of \$3 million in actual damages and \$1 million in punitive damages.¹⁰¹ SEL and Lipscomb both appealed the jury's verdicts, but SEL ultimately settled its claims by paying \$1.5 million to the Dutch Fork entities.¹⁰²

4. *South Carolina Supreme Court's Decision*

As a result of the settlement, SEL was no longer a party, but Dutch Fork continued to pursue the claims against Lipscomb as the case ascended to the South Carolina Supreme Court on appeal.¹⁰³ On appeal, Lipscomb asserted that: "(1) he, as the manager of SEL, [could not] be held individually liable for the claim of tortious interference with the contract; and (2) even if he [was] liable,

94. *Id.*

95. *Id.*

96. *See id.* at *3 & n.1.

97. *Id.* at *3 & n.2.

98. *See id.* at *4 (citing S.C. CODE ANN. § 33-44-303(a) (2006)).

99. *Id.* at *3.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.*

the award of actual damages was improper.”¹⁰⁴ Lipscomb essentially claimed, and the court ultimately agreed, that Dutch Fork’s only form of recovery was for a breach of contract claim, which had already been satisfied through the settlement agreement with SEL.¹⁰⁵

In asserting that he, as the LLC’s manager, could not be personally liable for tortious interference with a contract involving his LLC, Lipscomb relied on section 33-44-303(a) of the Act, claiming that it provided him with statutory protection from personal liability.¹⁰⁶ The court challenged this claim by citing to its decision in *Jade Street* for the proposition that a manager of an LLC may be held personally liable for torts of the LLC.¹⁰⁷ However, the court found *Jade Street* was not dispositive of the issue in *Dutch Fork Development* because *Dutch Fork Development* involved a separate question of whether Dutch Fork “could sustain a claim of tortious interference with a contract.”¹⁰⁸ In other words, the *Dutch Fork Development* court reaffirmed that an LLC manager could be held individually liable for torts, but then had to determine whether this particular LLC manager could be held liable for the tort of tortious interference with a contract.¹⁰⁹

To determine whether Dutch Fork could sustain a claim against Lipscomb for tortious interference with a contract, the court first sought to “identify the elements of the tort and the privileges afforded to a corporate agent.”¹¹⁰ Relying on a previous formulation of the claim, the court identified the elements of a cause of action for tortious interference with contract as “(1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.”¹¹¹ Furthermore, the court provided, “[A]n action for tortious interference protects . . . parties to a contract [from] unlawful interference by third parties [and, t]herefore, it does not protect a party to a contract from actions of the other party.”¹¹² The court then relied on corporate law to introduce the determinative issue for tortious interference liability in the case¹¹³: “It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and

104. *Id.* at *4.

105. *Id.*

106. *See id.* (citing S.C. CODE ANN. § 33-44-303(a) (2006)).

107. *See id.* (citing 16 *Jade St., LLC v. R. Design Constr. Co.*, 398 S.C. 338, 349, 728 S.E.2d 448, 454 (2012), *reh’g granted* (May 7, 2012)).

108. *Id.*

109. *See id.* (citing *Jade St.*, 398 S.C. at 349, 728 S.E.2d at 454).

110. *Id.*

111. *Id.* (quoting *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)) (internal quotation marks omitted).

112. *Id.* (citation omitted) (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)) (internal quotation marks omitted).

113. Presumably, the court relied on corporate law because there was not yet LLC case law in South Carolina for the quoted proposition. The court thus treats corporate law and LLC law interchangeably in this context.

within the scope of his employment, the inducement is privileged and is not actionable.”¹¹⁴ This privilege is a “qualified privilege” that protects a principal’s agent from liability for tortious interference with the contract of the principal.¹¹⁵ The court provided that “[t]he reason for th[e qualified] privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract.”¹¹⁶

The court expounded on the critical notion that the agent’s privilege from tortious interference is qualified, clarifying that the agent’s privilege is qualified because it applies to protect the agent from liability “only when the agent is acting within the scope of [his] authority.”¹¹⁷ Therefore, the court reasoned, the privilege would not protect an agent from liability if the allegedly interfering acts were “conducted outside the scope of the agent’s authority”; the agent would be treated as an “outside third party.”¹¹⁸ Finally, the court concluded that, “as a matter of law, a manager of a limited liability company can wrongfully interfere with his company’s contracts and be held individually liable for his acts.”¹¹⁹ Despite its conclusion that LLC members and managers could be held personally liable, the court ultimately determined that Lipscomb was not liable for tortious interference with a contract under the facts of the case.¹²⁰

The court introduced its analysis by noting that the failure to include the LLC’s operating agreement in the court’s record was a serious impediment to establishing a tortious interference with a contract claim against an LLC manager, because the operating agreement establishes the scope of the manager’s authority.¹²¹ The court remarked that without SEL’s operating agreement, the court was unable to discern the scope of Lipscomb’s authority, and “[w]ithout an

114. *Dutch Fork*, 2012 WL 3667374, at *5 (quoting *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979)).

115. *Id.* (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 385 (3d Cir. 2004)) (internal quotation marks omitted); see also Thomas G. Fischer, Annotation, *Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation’s Contract with Another*, 72 A.L.R.4TH 492, §§ 3–8 (1989 & Supp. 2012) (citations omitted) (providing helpful background information by, according to the court, “analyzing state cases involving the question of whether a director, officer, or employee could be held personally liable for tortious interference with a corporate contract where the individual was considered a party to the contract, acted to serve the corporate interests, or acted on behalf of personal interests” (quoting *Dutch Fork*, 2012 WL 3667374, at *5)).

116. *Dutch Fork*, 2012 WL 3667374, at *5 (quoting *CGB Occupational Therapy*, 357 F.3d at 385) (internal quotation marks omitted).

117. *Id.* (quoting *CGB Occupational Therapy*, 357 F.3d at 385).

118. *Id.* (quoting *CGB Occupational Therapy*, 357 F.3d at 385) (citing *Kia v. Imaging Scis. Int’l, Inc.*, 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010)); see also *Kia*, 735 F. Supp. 2d at 268 (“[A] corporate officer can be liable for tortious interference only if he ‘was acting in a personal capacity or outside the scope of his authority.’” (quoting *Am. Trade Partners, L.P. v. A-1 Int’l Importing Enters., Ltd.*, 757 F. Supp. 545, 555 (E.D. Pa. 1991))).

119. *Id.*

120. See *id.* at *6.

121. See *id.* at *5.

identifiable scope of authority, [the court was] left to speculate whether [Lipscomb's] actions exceeded his authority as the managing agent of SEL."¹²²

The court found that "each of the actions relied upon by [Dutch Fork] to support [its] claim can only be attributed to SEL and not to [Lipscomb] personally."¹²³ To support this finding, the court pointed to the fact that, "[w]ith respect to each of these actions, the documentation in the record establish[ed] that SEL was the entity that sold the lots, signed off on change orders for the development plans, terminated the contract, and entered into the contract with Essex Homes."¹²⁴ The court did acknowledge that Lipscomb was the primary actor in each transaction, but concluded that "there [was] no evidence to refute that he acted within his authority as the manager of SEL."¹²⁵ Further, the court stated that even if Lipscomb received personal "financial benefit from the sale of the lots to K&L," a company he was a member of, "the sales were nevertheless done on behalf of SEL."¹²⁶

In summary, the court concluded that because Lipscomb's actions could be attributable only to SEL, there was insufficient evidence to establish a claim that he was individually liable for tortious interference with a contract.¹²⁷ In support of this conclusion, the court pointed specifically to its inability to determine the scope of Lipscomb's authority from the record and Dutch Fork's failure to identify how Lipscomb exceeded his authority as the managing agent of SEL.¹²⁸ As a result, the court reversed the award of damages for the tortious interference with a contract cause of action against Lipscomb.¹²⁹

III. ANALYSIS OF TORTIOUS INTERFERENCE LIABILITY UNDER *DUTCH FORK DEVELOPMENT*

A. *Identifying the Uncertainty Created by Dutch Fork Development*

The court's opinion in *Dutch Fork Development*, though seemingly straightforward, fails to demonstrably explain or apply South Carolina law as it relates to an LLC manager's tortious interference with a contract. These failures create uncertainty for an attorney attempting to use the *Dutch Fork Development* decision to counsel a client who is concerned about the potential liability of an LLC manager for tortious interference with a contract. Specifically, though the *Dutch Fork Development* decision clearly provided that "a manager of a limited

122. *Id.*

123. *Id.* Dutch Fork "primarily relied upon the sale of lots to K&L, the redesign of the development plans for Phases II and III, the termination of the contract, and the sale of the project to Essex Homes." *Id.* at *6.

124. *Id.* at *6.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at *7.

129. *See id.*

liability company can wrongfully interfere with his company's contracts and be held individually liable for his acts,"¹³⁰ it failed to develop a comprehensive framework to determine *when* a manager may be liable or explain which facts it found determinative in applying the relevant law to the case.¹³¹ The court did generally establish that a manager can be held liable for his allegedly interfering acts if they are conducted outside the scope of his authority with the LLC.¹³² However, the court then simply concluded that "each of the actions relied upon by Respondents to support their claim can only be attributed to SEL and not [Lipscomb] personally,"¹³³ and that "there [was] no evidence to refute that [Lipscomb] acted within his authority as the manager of SEL,"¹³⁴ without offering any significant guidance or factual analysis as to how or why it arrived at these conclusions. As a result, an attorney and, more importantly, a client whose decisions will ultimately be affected by the attorney's counsel, have no guidance in determining what behavior constitutes "acting outside the scope of authority" or "acting on behalf of the company." Because the distinction between these types of activities appears to be the determinative issue for an LLC manager's liability for tortious interference with a contract, the court's decision consequently fails to provide sufficient clarity about when an LLC manager may actually be held liable.

Admittedly, Dutch Fork made the court's task of providing a comprehensive legal analysis more difficult by failing to include the operating agreement or more detailed factual allegations in the court's record.¹³⁵ However, despite the limited record, the court made critical factual and legal conclusions that it must have deemed as supported by some basis other than Dutch Fork's failure to provide a thorough record. A more comprehensive discussion of the basis for the court's conclusions in *Dutch Fork Development* and additional guidance as to determinative facts for when an LLC manager or member can be held liable for tortious interference with a contract of the LLC, even if only in dicta, would have likely resolved much of the uncertainty resulting from the decision. Nevertheless, although the South Carolina Supreme Court did not declare an express personal-interest limitation for an LLC manager's claiming privilege from tortious interference, such a personal-interest limitation seems to be implicit in its reasoning and thus should guide lawyers and their LLC member or manager clients.¹³⁶

130. *Id.* at *5.

131. *See id.* at *4–6 (citations omitted).

132. *See id.* at *5 (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 385 (3d Cir. 2004)) (citing *Kia v. Imaging Scis. Int'l, Inc.*, 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010)).

133. *Id.*

134. *Id.* at *6.

135. *See id.* at *5.

136. *See id.* at *6 (noting that Lipscomb benefitted financially from the transactions but that he also acted "on behalf of SEL," which implicitly suggests that a manager acting purely out of personal interest would not be shielded from a claim for tortious interference with a contract).

B. Identifying and “Defining” the Key Concepts for Determining When an LLC Manager Is Afforded a Privilege from Tortious Interference Liability

A key threshold matter in analyzing *Dutch Fork Development* and personal liability of an LLC manager for tortious interference should be to distinguish between a manager “acting within the scope of his authority,”¹³⁷ a manager “acting on behalf of”¹³⁸ the LLC, and a manager acting with possible personal interests.¹³⁹ Much of the confusion *Dutch Fork Development*’s analysis caused is likely a result of the court’s blending of these concepts into a single analysis without individually defining or distinguishing among them. The court may not have intended to individualize these three concepts, but cases the court cited, as well as persuasive authority from other jurisdictions, indicate that each may be used as a separate and distinct consideration of a tortious interference claim.¹⁴⁰ Because it is unclear how the court intended each concept to apply, persuasive authority can supplement the court’s opinion to identify the possible approaches to tortious interference and what is the most likely interpretation of the court’s language with regard to a manager’s “acting within the scope of authority,” “acting on behalf of,” and acting with possible personal interests in the transaction.

Though *Dutch Fork Development* thoroughly discusses the significance of only one of these concepts, “scope of authority,”¹⁴¹ the case is the controlling authority in South Carolina, and accordingly this term provides the best starting point for analysis. *Dutch Fork Development* defined “scope of authority” as “[t]he range of reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal’s business.”¹⁴² The court contrasts a manager who is acting within the scope of his authority with one acting outside the scope of his authority.¹⁴³ In applying this definition to the facts of *Dutch Fork Development*, the court ultimately determined that the

137. *Id.* at *5 (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 385 (3d Cir. 2004)).

138. *Id.* (quoting *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979)).

139. *See id.* at *6.

140. *See, e.g., Bradburn*, 273 S.C. at 188, 255 S.E.2d at 455 (citations omitted) (including “acting on behalf of the corporation” as an element of whether an action is privileged). For a discussion of how persuasive authority can be used to supplement the court’s opinion, see *infra* Part III.C. For a discussion of whether *Dutch Fork* could have implicitly contained a separate personal-interest consideration, see *infra* Part III.D.

141. *See Dutch Fork*, 2012 WL 3667374, at *5 (quoting *CGB Occupational Therapy*, 357 F.3d at 385; BLACK’S LAW DICTIONARY, *supra* note 69, at 1465) (citing *Kia v. Imaging Scis. Int’l, Inc.*, 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010)).

142. *Id.* at *5 (alteration in original) (quoting BLACK’S LAW DICTIONARY, *supra* note 69, at 1465) (internal quotation marks omitted).

143. *See id.* (quoting *CGB Occupational Therapy*, 357 F.3d at 385) (citing *Kia*, 735 F. Supp. 2d at 268).

following actions were within the scope of the manager's authority: "the sale of lots to K&L [an LLC in which Lipscomb was a member], the redesign of the development plans for Phases II and III, the termination of the contract[s] between SEL and Dutch Fork], and the sale of the project to Essex Homes."¹⁴⁴ In rejecting Dutch Fork's argument that the manager was acting outside the scope of his authority,¹⁴⁵ the court stated that the record reflected that SEL as an entity performed those actions and although the manager was the principal actor in the transactions, there was no evidence to suggest that he acted outside the scope of his authority.¹⁴⁶

The bulk of the court's analysis in *Dutch Fork Development* focused on a manager acting within the scope of authority; however, the court did briefly reference "acting on behalf of,"¹⁴⁷ as well as, though implicitly, the LLC manager's possible personal interest in the transaction.¹⁴⁸ The court first introduced the concept of an agent "acting on behalf of" his principal in conjunction with an agent "acting within the scope of authority," stating, "It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation *acting on behalf of* the corporation and *within the scope of his employment*, the inducement is privileged and is not actionable."¹⁴⁹ Although the court included no further legal analysis regarding "acting on behalf of," the language quoted clearly identifies "acting on behalf of" the corporation and "within the scope of his employment" as two separate requirements.

The court also appeared briefly to address the manager's possible personal interest in the transaction when it discussed the critical issue of this analysis: the LLC manager's receipt of personal financial benefit from an allegedly interfering act.¹⁵⁰ However, in addressing the issue, the court simply stated that "[e]ven if [Lipscomb], as a member of K&L, received [a] financial benefit from [SEL's] sale of the lots to K&L, the sales were nevertheless done on behalf of SEL."¹⁵¹ The court's inclusion of Lipscomb's possible financial benefit as an additional consideration suggests that a manager's financial benefit from, and thus personal interest in, the transaction is a consideration in determining whether a manager

144. *See id.* at *6.

145. *See id.* Dutch Fork argued that these actions must have been performed outside the scope of the manager's authority based on the following inferential steps: "[T]here was no legitimate business justification for [the] actions," thus, the actions "did not serve the corporate interests of SEL," thus, the "actions would not have been authorized by SEL" and, accordingly, the actions must have been taken in Lipscomb's personal capacity. *See id.*

146. *See id.*

147. *Id.* at *5 (quoting *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979)) (internal quotation marks omitted).

148. *See id.* at *6.

149. *Id.* at *5 (emphasis added) (quoting *Bradburn*, 273 S.C. at 188, 255 S.E.2d at 455) (internal quotation marks omitted).

150. *See id.* at *6.

151. *Id.*

can be held liable for tortious interference in South Carolina. Unfortunately, it is unclear whether the court here considered the manager's possible personal interest as a part of the scope-of-authority determination, or if personal interests and "acting on behalf of the LLC" are somehow separate considerations for tortious interference liability.

As a result of the court's passing treatment of "acting on behalf of" and the manager's possible personal interest in the transaction, the significance of these two concepts to tortious interference liability and their intended application alongside scope-of-authority considerations is unclear. However, as the following section illustrates, other courts have defined and applied the concepts more distinctly and such persuasive authority may be used in conjunction with *Dutch Fork Development* to develop a clearer understanding of how "acting within the scope of authority" relates to "acting on behalf of" the LLC and a manager's possible personal interest, as well as what those terms mean in the context of a manager's tortious interference with his LLC's contract.¹⁵²

C. Using Persuasive Authority to Understand Dutch Fork Development's Use of Key Concepts

When the South Carolina Supreme Court originally established that an agent acting on behalf of a corporation and acting within the scope of his authority is privileged from tortious interference liability in *Bradburn v. Colonial Stores, Inc.*,¹⁵³ the court relied on several state court opinions, including a North Carolina court's slightly different statement of the privilege.¹⁵⁴ The North Carolina court, in *Wilson v. McClenny*,¹⁵⁵ stated that, for "[t]he acts of a corporate officer in inducing his company to sever contractual relations with a third party . . . [i]ndividual liability may . . . be imposed where his acts involve individual and separate torts distinguishable from acts solely on his employer's behalf or where his acts are performed in his own interest and adverse to that of his firm."¹⁵⁶ This statement from *Wilson* serves as further evidence that, even though the *Bradburn* court chose to employ different language for South

152. See discussion *infra* Part III.C.

153. See 273 S.C. at 188, 255 S.E.2d at 455 (citing *Kiyose v. Trs. of Ind. Univ.*, 333 N.E.2d 886, 891 (Ind. Ct. App 1975); *May v. Santa Fe Trail Transp. Co.*, 370 P.2d 390, 395 (Kan. 1962); *Wilson v. McClenny*, 136 S.E.2d 569, 578 (N.C. 1964); 44B AM. JUR. 2D, *supra* note 140, § 54; Annotation, *supra* note 140).

154. See *id.* (citing *Kiyose*, 333 N.E.2d at 891; *May*, 370 P.2d at 395; *Wilson*, 136 S.E.2d at 578; 44B AM. JUR. 2D, *supra* note 140, § 54; Annotation, *supra* note 140); see also *Wilson*, 136 S.E.2d at 578 (expressing the slightly different statement).

155. 136 S.E.2d 569.

156. *Id.* at 578 (quoting *A. S. Rampell, Inc. v. Hyster Co.*, 148 N.Y.S.2d 102, 106 (Sup. Ct. 1955), *aff'd as modified*, 153 N.Y.S.2d 176 (App. Div. 1956), *aff'd in part, rev'd in part*, 144 N.E.2d 371 (N.Y. 1957)) (citing *W. P. Iverson & Co. v. Dunham Mfg. Co.*, 152 N.E.2d 615, 622–623 (Ill. App. Ct. 1958); *Pennington Trap Rock Co. v. Pennington Quarry Co.*, 38 A.2d 869, 870–71 (N.J. 1944)).

Carolina courts,¹⁵⁷ the rule cited in *Dutch Fork Development* contemplates considerations beyond simply whether the manager was acting within the scope of his authority.¹⁵⁸ Thus, there is both South Carolina precedent and persuasive case law South Carolina courts have cited that support reading the requirement that an LLC manager “act on behalf of” the LLC as a separate requirement from acting “within the scope” of his authority with the LLC.

In addition to South Carolina and North Carolina courts providing “acting on behalf of” the LLC as a separate requirement from “acting within the scope of authority” for privilege from tortious interference liability, there is support for creating an altogether separate limitation on the personal interest an LLC manager may have in a given transaction.¹⁵⁹ Other courts have also included a consideration of personal interest in an allegedly tortious action in their determination of whether a corporate officer can be held liable.¹⁶⁰ For example, the rule in New York is, “[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer . . . [and did not commit] independent torts or predatory acts directed at another.”¹⁶¹ To satisfy this rule, a plaintiff may not merely allege specific wrongful acts on the part of the officer, but he must sufficiently allege that the acts were taken outside the scope of his authority or that he personally profited from his acts.¹⁶² The New York Supreme Court, Appellate Division reaffirmed the inclusion of personal interest in its requirement for tortious interference with a contract, holding that the plaintiff’s pleadings must contain an allegation that there was tortious

157. See *Bradburn*, 273 S.C. at 188, 255 S.E.2d at 455 (citing *Kiyose*, 333 N.E.2d at 891; *May*, 370 P.2d at 395; *Wilson*, 136 S.E.2d at 578; 44B AM. JUR. 2D, *supra* note 140, § 54; Annotation, *supra* note 140).

158. See *Dutch Fork*, 2012 WL 3667374, at *5 (quoting *Bradburn*, 273 S.C. at 188, 255 S.E.2d at 455).

159. See, e.g., *George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.*, 719 F.2d 1326, 1333 (7th Cir. 1983) (stating that Illinois requires the alleged wrongdoer to have “induced the breach to further [his] personal goals”).

160. See, e.g., *Courageous Syndicate, Inc. v. People-to-People Sports Comm., Inc.*, 529 N.Y.S.2d 520, 521 (App. Div. 1988) (quoting *Citicorp Retail Servs., Inc. v. Wellington Mercantile Servs., Inc.*, 455 N.Y.S.2d 98, 99–100 (App. Div. 1982); *Murtha v. Yonkers Child Care Ass’n, Inc.*, 383 N.E.2d 865, 866 (N.Y. 1978)) (stating that a corporate director performing an act where he “personally profited” might make him personally liable for the act); *Di Nardo v. L & W Indus. Park of Buffalo, Inc.*, 425 N.Y.S.2d 704, 705 (App. Div. 1980) (citing *Turntables, Inc. v. M. B. Plastics Corp.*, 297 N.Y.S.2d 51, 53 (App. Div. 1969); *Rothschild v. World-Wide Autos. Corp.*, 264 N.Y.S.2d 705, 707 (App. Div. 1965), *aff’d*, 224 N.E.2d 724 (N.Y. 1966)) (“Generally, when an officer or director acts on behalf of his corporation, he may not be held liable for inducing his corporation to violate its contractual obligations unless his activity involves separate tortious conduct or results in personal profit.”).

161. *Citicorp*, 455 N.Y.S.2d at 99 (alteration in original) (quoting *Murtha*, 383 N.E.2d at 866) (internal quotation marks omitted).

162. *Id.* at 99–100.

conduct on the part of appellant that was separate from his conduct as officer and director or that he personally profited from the transaction.¹⁶³

Furthermore, the United States Court of Appeals for the Seventh Circuit, applying Illinois state law, has likewise considered a corporate agent's personal interest in the transaction when determining whether he was privileged from tortious interference liability.¹⁶⁴ The Illinois privilege from tortious interference, similar to that afforded LLC managers in South Carolina, provides that because "[c]orporate officers are not outsiders intermeddling . . . in the business affairs of the corporation[, t]hey are privileged to act on behalf of their corporations, using their business judgment and discretion."¹⁶⁵ Thus, to state a cause of action against corporate agents for interfering with their corporate principal's contract, Illinois law requires "the allegation of facts which, if true, establish that the officers induced the breach to *further their personal goals* or to injure the other party to the contract, and acted contrary to the best interest of the corporation."¹⁶⁶ Therefore, substantial support exists from other jurisdictions for adopting a separate and distinct consideration of an LLC manager's personal interest in the transaction in order to create a more comprehensive framework to determine whether an LLC manager can be liable for tortious interference with a contract.

D. Finding a Personal-Interest Limitation in Dutch Fork Development

Other courts' support for adopting a separate consideration of the manager's personal interest in the transaction, in addition to the requirement that the manager be acting within the scope of his authority, compels an analysis of *Dutch Fork Development* to determine if it could have implicitly contained a similar personal-interest consideration. It seems that there are two different approaches available to arrive at a personal-interest limitation for an LLC manager's privilege from tortious interference. First, a limitation on the manager's personal interest could be read implicitly into the "acting on behalf of the company" language from *Dutch Fork Development* such that if a manager had sufficient personal interest in a transaction it would preclude him from having also been acting on behalf of his company.¹⁶⁷ The manager could thus be held liable for tortious interference with the LLC's contract. Under this

163. See *Courageous Syndicate*, 529 N.Y.S.2d at 521 (citing *Citicorp*, 455 N.Y.S.2d at 99–100).

164. See *George A. Fuller Co.*, 719 F.2d at 1333.

165. *Id.* (citing *Loewenthal Sec. Co. v. White Paving Co.*, 184 N.E. 310, 316 (Ill. 1932)).

166. *Id.* (emphasis added).

167. See, e.g., *Wilson v. McClenny*, 136 S.E.2d 569, 578 (N.C. 1964) (quoting *A. S. Rampell, Inc. v. Hyster Co.*, 148 N.Y.S.2d 102, 106 (Sup. Ct. 1955), *aff'd as modified*, 152 N.Y.S.2d 176 (App. Div. 1956), *aff'd in part, rev'd in part*, 144 N.E.2d 371 (N.Y. 1957)) (citing *W. P. Iverson & Co. v. Dunham Mfg. Co.*, 152 N.E.2d 615, 622–623 (Ill. App. Ct. 1958)); *Pennington Trap Rock Co. v. Pennington Quarry Co.*, 38 A.2d 869, 870–71 (N.J. 1944) (requiring that the corporate agent's acts be performed *solely* on behalf of the company, precluding him from having a personal interest in the transaction)).

approach, “acting on behalf of” the LLC, with an implicit limitation on a manager’s personal interest, would constitute a requirement entirely separate from “acting within the scope of authority.” As an alternative approach, though other courts have not expressly pronounced such an interpretation, a court could use the phrase “acting on behalf of” coextensively with “acting within the scope of authority.” Under this approach, if the court wished to include a limitation of the manager’s personal interest in the transaction, it would have to be a separate consideration from whether the manager was acting on behalf of the LLC. Thus, a manager’s personal interest in the transaction would be a separate means of manager liability for tortious interference, available even when the manager’s actions were on behalf of the LLC or within the scope of his authority (using those phrases synonymously).

Though it lacks the judicial support of treating the concepts separately, a coextensive reading of the two concepts is a logical interpretation of the court’s language in *Dutch Fork Development* because, unlike courts from other jurisdictions, the court failed to expressly include or adequately declare the existence of a separate requirement for tortious interference that limits the LLC manager’s personal interest in the transaction.¹⁶⁸ The role of a manager’s personal financial interest and how the court applied the “acting on behalf of” principle is certainly unclear as result of its cursory treatment of the issue; however, an analysis of the court’s language reveals that the court could have intended it to be synonymous with “acting within the scope of authority.”¹⁶⁹ For instance, the court concluded that, even if the manager was receiving a financial benefit from the transaction, “the sales were nevertheless done on behalf of SEL” and the manager’s actions can “only be attributable to SEL,” but it pointed to no facts to support this conclusion or why the manager’s receipt of a financial benefit was not sufficient for him to no longer be acting “on behalf of SEL.”¹⁷⁰ In so stating, the court appears to be reasoning that the sales and other actions the manager took were “on behalf of” the LLC simply because he was acting as an agent of the company in the course of the company’s business.¹⁷¹ Furthermore, the court did not cite any additional supporting facts or provide any additional relevant law that would suggest it considered “acting on behalf of” as a separate consideration from “acting within the scope of authority,” further suggesting that it may have treated the concepts coextensively.¹⁷² If the court did indeed treat the two concepts coextensively, the lack of an additional express personal-interest limitation would suggest that the court imposed no such limitation on an LLC manager’s personal interest in a transaction that leads to the breached contract. It would be ill-advised, however, for an attorney to adopt such a

168. See *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, No. 27139, 2012 WL 3667374, at *4–6 (S.C. Aug. 22, 2012) (citations omitted).

169. See *id.* at *6.

170. See *id.*

171. See *id.*

172. See *id.* at *4–6 (citations omitted).

reading of *Dutch Fork Development* because, in light of persuasive support for reading “acting on behalf of” and “acting within the scope of authority” as two separate considerations and the court’s unclear application of these concepts, there is too much uncertainty to confidently depart from that approach.¹⁷³

If, instead, the court intended for “acting on behalf of,” with an implicit personal-interest limitation, to be a separate standard from “acting within the scope of authority,” then the court’s failure to provide facts supporting its conclusion that the sales to K&L were on behalf of SEL establishes a precedent that is essentially unworkable going forward. For example, there is no way to determine what the legal standard “acting on behalf of” means in this context because the court never effectively addresses it.¹⁷⁴ “Acting on behalf of” the LLC is mentioned only in the court’s initial introduction of the rule from *Bradburn* and its conclusory sentences declaring the sales and other actions of the manager to have been taken on behalf of the LLC.¹⁷⁵ Furthermore, even if one attempted to apply the standard, in spite of the dearth of analysis, by narrowly using just the facts of this case, it would not be possible because the court fails to mention a single fact relevant to its conclusion that Lipscomb’s actions were taken on behalf of SEL.¹⁷⁶ The only fact mentioned in this discussion, a possible financial benefit to the LLC manager, would actually be more relevant to refuting the notion that Lipscomb was acting on behalf of SEL.¹⁷⁷ However, instead of explaining why it considered the sales executed on behalf of the LLC despite Lipscomb’s possible personal interest, the court dismissed the manager’s possible personal interest in the sales by concluding that they were made on behalf of SEL.¹⁷⁸ Such circular analysis has no prospective value for attorneys and clients in regards to personal claims against LLC managers for tortious interference with a contract.

IV. CONCLUSION

This Note does not claim that the result reached in *Dutch Fork Development* was erroneous or that the manager should have been held liable under the facts of that case. Instead, it finds fault with the court’s failure to provide a demonstrable legal framework or explain how it applied the relevant law to the facts of the case. The concern is that lawyers and their clients will struggle to

173. See *supra* Part III.B–C.

174. See *Dutch Fork*, 2012 WL 3667374, at *4–6 (citations omitted).

175. See *id.* at *5–6 (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 357 F.3d 375, 385 (3d Cir. 2004); *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979); BLACK’S LAW DICTIONARY, *supra* note 69, at 1465) (citing *Kia v. Imaging Scis. Int’l, Inc.*, 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010)).

176. See *id.* at *5–7 (quoting *CGB Occupational Therapy*, 357 F.3d at 385; *Bradburn*, 273 S.C. at 188, 255 S.E.2d at 455; BLACK’S LAW DICTIONARY, *supra* note 69, at 1465) (citing *Kia*, 735 F. Supp. 2d at 268).

177. See *id.* at *6.

178. See *id.*

predict how *Dutch Fork Development* would apply in their particular circumstances and be unable to make a legal determination as to whether an LLC manager could be held liable for tortious interference with his LLC's contract. Specifically, due to the uncertainty *Dutch Fork Development* created, there is room in the opinion for a South Carolina court to construe "actions taken on behalf of the company" as a separate requirement from "acting within the scope of authority" and to apply a limitation on the personal interest the LLC manager has in the transaction. Though this may not be the most straightforward reading of the case, it has been adopted by other courts¹⁷⁹ and is one that attorneys and their clients need to be aware of under similar circumstances.

Adopting an LLC manager's personal interest in the transaction as a consideration for determining whether he can be held liable for tortious interference with a contract would alleviate concern that LLC managers are currently enabled to self-servingly interfere with contracts without fear of liability under *Dutch Fork Development*. The negative consequences of focusing solely on the manager's scope of authority become evident in cases such as *Dutch Fork Development*, where the LLC manager's scope of authority may encompass any number of actions that would interfere with a contract of the LLC.¹⁸⁰ For example, there are likely very few actions that the manager of a small real estate development company could take in regard to a contract with another real estate developer that would be outside the scope of his authority. The manager will almost always be within his authority to sell the company's lots to another company, redesign established plans for the company's developments, terminate contracts with developers he thinks have failed to satisfy those contracts, and subsequently sell the project to another developer. Furthermore, such an all-encompassing authority for the LLC's manager will likely be the case in a significant number of smaller LLCs in South Carolina, no matter the industry. Accordingly, with "scope of authority" as an LLC manager's only limitation, that manager could also cause the company to breach a contract with another company and self-servingly provide all of the contract benefits to a company in which he has a financial stake, thus securing a huge financial gain for himself, potentially to the detriment of the LLC and in furtherance of his own personal interests, without threat of legal liability. Though this extreme may not have occurred in *Dutch Fork Development*, the legal framework established in the court's decision appears to allow for such a situation to occur without the possibility of holding the LLC manager personally liable for his self-serving inducement of the breach simply because he was within the broad scope of his authority.¹⁸¹

179. See *supra* notes 159–66 and accompanying text.

180. See, e.g., *Dutch Fork*, 2012 WL 3667374, at *6 (manager sold lots, signed off on change orders for development plans, and terminated and entered into contracts).

181. See *supra* Part II.D.4.

To remedy this problem and ensure protection from liability for LLC managers, attorneys should advise their clients if *Dutch Fork Development* includes an implicit personal-interest limitation. Though the South Carolina Supreme Court did not pronounce an express personal-interest limitation for an LLC manager's privilege from tortious interference liability, unless and until the court clarifies the significance of a manager's personal interest in a transaction involving a breached contract of the LLC, it is something that must be considered when providing counsel and making business decisions.

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